Supreme Court, U.S.
FILED

No. 05-852 DEC 29 2005

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In The

Supreme Court of the United States

GURPREET KHURANA,

Petitioner,

v.

ALBERTO R. GONZALES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an immigration judge can hold that an alien filed a "frivolous asylum application" under 8 U.S.C. § 1158(d)(6) without finding that the alien *knowingly or deliberately fabricated* a material fact, as required under 8 U.S.C. § 1158(d)(6), the federal regulations, the law of four Circuit Courts of Appeals, and the Fifth Amendment of the United States Constitution.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Gurpreet Khurana, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals in Petitioner's petition for panel rehearing and rehearing en banc is unpublished. The opinion of the Court of Appeals in Petitioner's petition for review is unpublished. The decision is reported at 134 Fed. Appx. 147 (2005). The opinions of the Board of Immigration Appeals and the Immigration Judge are also unpublished. All opinions are reprinted in the Appendix.

JURISDICTION

The Ninth Circuit Court of Appeals filed its decision on June 8, 2005. It denied a timely petition for panel rehearing and petition for rehearing en banc on September 30, 2005. This Court has jurisdiction to review the circuit court's decision on writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

8 U.S.C. § 1158(d)(6) ("Frivolous [asylum] applications"):

> If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

8 C.F.R. §§ 208.20, 1208.20 ("Determining if an asylum application is frivolous"):

> For applications filed on or after April 1, 1997, an applicant is subject to the provisions of section 208(d)(6) of the Act only if a final order by an immigration judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous asylum application. For purposes of this section, an asylum application is frivolous if any of its material elements is deliberately fabricated. Such finding shall only be made if the immigration judge or the Board is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. For purposes of this section, a finding that an alien filed a frivolous asylum application shall not preclude the alien from seeking withholding of removal.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War

or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner is a 35 year-old Sikh woman from India, who was raped, beaten, and threatened by the Indian police on multiple occasions for protesting human rights abuses against Sikhs. She currently resides in the United States with her husband and their two United States citizen minor children.

On April 18, 2002, Petitioner filed for asylum with the assistance of an immigration consultant. She sought asylum and withholding of removal on the basis of her religion, political opinion, and particular social group. She also asked for protection pursuant to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("CAT"), as implemented by Pub. L. No. 105-277, § 2242, 112 Stat. 2681, 2681-821 (Oct. 21, 1998). On May 29, 2002, her case was referred to the Immigration Court and she was charged as removable from the United States.

In her application and during her hearing, Petitioner stated that she had been harassed and targeted by the Indian police for her participation in peaceful rallies that protested violence and discrimination towards Sikhs in India. Petitioner stated that she had been born and raised in New Delhi, India, as a practicing Sikh. In 1984, at the age of 14, she was raped during the anti-Sikh riots in New

Delhi following the assassination of the Indian Prime Minister by the Minister's Sikh bodyguards. As a consequence, she participated in political rallies throughout the years. After a rally in 1999, she was arrested, detained for two days, beaten, and raped by the police.

After this event, she sought to live outside of India, though she did return once in 2000 and once in 2001. The police continued to ask her family about her whereabouts in 2000 and 2001, and, during her visit in 2001, the police arrested, detained, beat, and threatened her again. Thus, after she returned to the United States, she finally filed for asylum.

Notably, during her hearing before the Immigration Judge ("IJ") and in her application, Petitioner testified that she was detained in India in 1999 from March 30 to April 2, 1999. *See e.g.*, Ninth Circuit Administrative Record ("A.R.") at 111, 113, 140; Transcript of Immigration Court Proceedings, October 7, 2002 ("Tr.") at 45, 47, 74. However, her passport showed that she did not enter India until April 2, 1999. A.R. 167; Tr. 101; *see also* Immigration Court Proceedings, Exhibit 9. When asked to explain the discrepancy, she denied lying about her arrest and said she did not remember entering on April 2, 1999. *See* A.R. 167, 170; Tr. 101, 104. The IJ and the Department of Homeland Security also questioned Petitioner regarding the date and arrangements of her marriage in 2001. A.R. 131-37, 169-70; Tr. 65-71, 103-104.

On October 7, 2004, following her individual hearing, the Immigration Judge rendered his oral decision. Specifically, the IJ found Petitioner not credible because of two alleged inconsistencies in her application: (1) Petitioner testified that she had been arrested in India on March 30, 1999 but her passport showed that she had not entered

India until April 2, 1999; and (2) that the appearance of her wedding in her photographs ostensibly conflicted with her testimony that the wedding had been planned hastily. *See* App. 14-16. The IJ concluded that "[s]ince [Petitioner's] asylum application is not credible," Petitioner had not established eligibility for asylum, withholding, and protection under CAT. App. 17, 19.

The IJ then went on to hold that "the elements of respondent's claim discussed above which lead the Court to find that her application is incredible also is a proper basis for finding that respondent's application is frivolous." App. 18. The IJ also denied her application for voluntary departure on the grounds that she was barred from establishing good moral character as one who has given false testimony for the purpose of obtaining immigration benefits under 8 U.S.C. § 1101(f)(6), INA § 101(f)(6). App. 20.

On February 16, 2004, the Board of Immigration Appeals ("BIA") adopted and affirmed the decision of the IJ. App. 6. It cited the inconsistency in the dates of her assault in 1999 and Petitioner's two return trips to India in 2000 and 2001 as supporting the IJ's findings that Petitioner was not credible. App. 6-7. It rejected Petitioner's explanation that, although she may have misremembered the date, the arrest, detention, and assault in 1999 had, in fact, occurred. *Id.*

The Ninth Circuit Court of Appeals assumed jurisdiction of this case pursuant to 8 U.S.C. § 1252. On June 8, 2005, this Court dismissed her appeal. *See* App. 2. Despite the fact that the IJ made no finding that Petitioner had deliberately fabricated facts in support of her asylum claim, the Court stated that "substantial evidence supports the

IJ's finding that Khurana filed a frivolous application containing deliberate fabrications under 8 U.S.C. § 1158(d)(6) and 8 C.F.R. § 208.20, and is thus permanently ineligible for any immigration benefit." App. 2.

On September 30, 2005, the Court denied her petition for panel rehearing and rehearing en banc. *See* App. 21.

REASONS FOR GRANTING THE PETITION

THE NINTH CIRCUIT'S DECISION ON THIS IMPORTANT MATTER VIOLATES THE STATUTE, THE REGULATIONS, AND THE CONSTITUTION, *AND* CONFLICTS WITH THE CASE LAW OF ALL FOUR CIRCUIT COURTS OF APPEALS THAT HAVE CONSIDERED WHAT IS REQUIRED FOR CONCLUDING THAT A FRIVOLOUS ASYLUM APPLICATION WAS MADE.

This petition for certiorari presents a question of compelling importance regarding whether an immigration judge can find that an alien filed a "frivolous asylum application" under 8 U.S.C. § 1158(d)(6), without finding that the alien *knowingly or deliberately fabricated* a material fact. *See* 8 U.S.C. § 1158(d)(6); 8 C.F.R. §§ 208.20, 1208.20. A frivolous filing finding under 8 U.S.C. § 1158(d)(6) constitutes a permanent bar to any immigration benefits in the future.

Consistent with the statute and its regulations, the Third, Fifth, Sixth, and Eleventh Circuit Courts of Appeals have upheld frivolous asylum findings only in cases where the immigration judge specifically found that the applicant *deliberately and knowingly* misrepresented a material fact in his or her application as required by the statute and the

regulations. *Muhanna v. Gonzales*, 399 F.3d 582 (3d Cir. 2004); *Efe v. Ashcroft*, 293 F.3d 899 (5th Cir. 2002); *Selami v. Gonzales*, 423 F.3d 621 (6th Cir. 2005); *Barreto-Claro v. U.S. Attorney-General*, 275 F.3d 1334 (11th Cir. 2001). The Immigration Judge made no such finding in this case. Nevertheless, the Ninth Circuit upheld the Judge's frivolous filing finding. Its decision thereby allows an individual to be permanently barred from ever residing in the United States, and from receiving any other benefits under the Immigration Act, for purely innocent misstatements of fact. Given that the decision is in clear conflict with the statute, the regulations, and the case law of four other Circuits, this Court should review this important matter.

The Immigration and Nationality Act ("INA") prohibits the granting of any immigration benefit to an individual who has been determined to have made a frivolous asylum application. *See* 8 U.S.C. § 1158(d)(6), INA § 208(d)(6). Under 8 U.S.C. § 1158(d)(6):

> If the Attorney General determines that an alien has *knowingly* made a frivolous application for asylum and the alien has received the notice under paragraph (4)(A), the alien shall be permanently ineligible for any benefits under this chapter, effective as of the date of a final determination on such application.

See 8 U.S.C. § 1158(d)(6) (emphasis added).

As explained in the Immigration Legislation Handbook, this provision is one of the "most extreme provisions" in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. Austin T. Fragomen, Jr., et al., IMMIGRATION LEGISLATION HANDBOOK § 8:96 (database updated